

Show your Fetish

VB verfassungsblog.de/show-your-fetish/

Maximilian Steinbeis Sa 12 Mai 2018

Sa 12 Mai 2018

Dear Friends of Verfassungsblog,

"Fetishism" is what Emmanuel Macron, in his [speech in Aachen](#) this week, called what stands in the way of French and Germans doing the right thing for Europe in his opinion. We worship fetishes, is Macron's diagnosis, we turn inanimate objects into active subjects animated by the power and the will to either make us healthy/rich/satisfied or to bring us death and despair: the former in the case of Germany on its knees before the altar of the *Schwarze Null*, the latter in the case of France trembling before the bogeyman called state spending reduction. Away with this superstition, exclaims Macron, the Enlightener: These magical things, they have no power over you but the one you fantasize into them! The German budget and trade surplus and the French level of government expenditure, in all their terrible grandeur, they do not exist out of their own power, but because and as far as we want it. And *whether or not* we want it that way is our political decision for which we are responsible and must justify ourselves.

I already articulated last week my yearning for enlightenment, for a straight back and sunshine and fresh air, and it has not diminished since then. A few days ago, my new friend Andrzej Bryk – the conservative constitutional law professor from Krakow, whom I [met in Poznan](#) the other day – wrote me an email and urged me to read an [article](#) by the philosopher and PiS deputy Ryszard Legutko as "a little contribution to our mutual understanding as Europeans" and a "must for Western Europeans / Germans (...) to understand what is going on in Eastern Europe today". In it, the author explains the "Battle for Europe" – so the title of the article – as a conflict that essentially revolves around abortion and gay marriage: The decadent Western elites are all for it, the brave Eastern Europeans all against, and the whole brawl is a "postcolonial" (sic!) attempt by the West to impose its own depravity on the East.



What, at first glance, is surprising about that article is that the actual areas of conflict – constitutional review, judicial independence, rule of law – are hardly mentioned at all. At second glance, however, that is only consequent: constitutional review, judicial independence and rule of law mean that all rule must be justified and give reasons for what it commands and prohibits. If you want to prohibit same-sex marriage and command raped women to give birth, you have at least to bring forward convincing reasons why that should be a good thing. And those are just, let's say, not easy to come by any more. Many people who would still very much like to prohibit or command these things simply have run out of reasons to convince even themselves with. That, and not moral conversion, is why most in

the German CDU and many Republicans in the USA have resigned themselves to the legal existence of gay marriage, and that is why, if the polls can be trusted, a majority of the Irish will decide this Sunday to remove the categorical ban on abortion from their constitution.

So, what are you going to do as a die-hard cultural conservative? You fetishize. Hey, it's not you who prohibits or commands anything at the expense of others! You can't be held responsible. It is the eternal institution of marriage! Unborn life! Christian culture! The will of the people! It's all out there, animated and willful and commanding our obedience and our sacrifices.

Well, no. That just won't do. We ask you to give reasons and stand up for them, and if you call that postcolonialism you better brace yourself for a hell of a debate on what postcolonialism is actually about.

Reviewing the "opening of the borders"

Law itself, even constitutional law, can also become part of a fetish, as can be seen in the ongoing debate about Angela Merkel's refugee policy since 2015. A conservative manifesto called "Erklärung 2018", calling for the "reinstatement of the rule of law at the borders of our country", makes the rounds in Germany these days and has gathered some 150,000 signatures so far. Last week DANIEL THYM had earned tremendous merits by exposing that alleged "continuous breach of law" as a myth by means of sober, lawyerly, EU-law-informed argumentation. But as the comments section shows, that sort of argument doesn't necessarily suffice to unsettle a fetishist: If the law does not buttress your allegation of a breach of law, all the worse for the law for there must be something wrong with it then. The reply to Thym by Thilo Sarrazin, the economist and former Berlin secretary of finance turned right-wing populist poster boy, is a perfect specimen of that sort of thinking.

The German far-right party AfD now seems to have called upon the Federal Constitutional Court to serve as a high priest to its fetish. According to the conservative blog "Achse des Guten", the AfD Members of Parliament have filed an motion to declare that the rights of the *Bundestag* have been infringed upon by the Federal Government by keeping the "borders open" without letting parliament decide. A lawsuit that, according to "Achse des Guten", will "certainly make a place in German legal history". Frankly, I find that somewhat unlikely as long as I don't see what exact decision parliament could, let alone *had to* agree to. Not deciding to close the border is not the same as deciding to open it, is it? I should think it is not trivial to explain to the Court how and when that alleged infringement exactly had taken place.

This lawsuit could therefore come to a rather sudden end, I guess. Not that the readers of the "Achse des Guten" would be greatly discomfited by that. They will keep licking their fetish no matter what, and if Karlsruhe doesn't go along with the magic, then to his own curse, which lurks in Article 20, para 4, of the Grundgesetz: All Germans, if an attempt to abolish the constitutional order is underway and all legal remedies are exhausted, are thereby entitled to a RIGHT TO RESISTANCE! Tremble, ye unfaithful! Woe be unto you when the dark power of that spell will be released!

For security's sake

Enough of that foolery. The biggest news event of this week with potential effects well beyond it was Donald Trump's decision for the **USA** to finally withdraw from the Iran Agreement. PAULA FISCHER and BERND SCHOLL had already argued two months ago that this step would imply a breach of international law.

Sometimes you have to step back two steps to see what is going on in its entire dimension. This is what CHRISTOPHE PAULUSSEN of the Asser Institute in The Hague tries to do in our current online symposium which compiles a collection of material that shows the tremendous inroad of anti-terrorism legislation within and outside Europe and the difficulties of the judiciary to come to grips with it – with reports by RUMYANA GROZDANOVA from the **Netherlands** and **UK**, MARTIN SCHEININ from **Finland**, ARIANNA VEDASCHI from **Italy**, MARGERITE ZOETEWELJ from **Turkey**, DANIEL SPRICK from **China**, BÉRÉNICE BOUTIN from **France**, our own BENJAMIN RUSTEBERG from **Germany** and LAURA GÓMEZ ABEJA from **Spain**.

In **Poland**, President Andrzej Duda calls upon the citizens to vote in November in a referendum whether the current Polish constitution should be reformed. Unlike Fidesz in Hungary, the Polish PiS has no constitutional majority. MARCIN MATCZAK describes what is behind Duda's move and how the current constitution is to be gradually delegitimized. And AGNIESZKA GRZELAK reports on the dilemma the Polish civil rights commissioner Adam Bodnar has to face when the three illegally elected "anti-judges" are to co-decide on his motions at the Constitutional Tribunal.

In **Austria**, the right-wing government wants to scrub the body of the law of outdated bills and regulations and has to that end drafted a law that declares all acts passed before 2000 to be invalid unless explicitly excluded. SEBASTIAN SPITRA analyses what this project reveals about the government's self-image (German).

In **Germany**, the public agitation about the fact that refugees have temporarily managed to save one their own from deportation in the Swabian town of Ellwangen and the ensuing police crackdown, is ebbing away only slowly: MAX PICHL sees that event as an act of civil disobedience rather than an attack on the rule of law and believes that the commotion reveals the triple standard the German public applies in terms of the rule of law (German).

The German state of **Berlin** wants to introduce a new bank holiday, and MANUEL MÜLLER calls for it to be the 9th of May, the birthday of the Schuman Declaration celebrated as "Europe Day" (German).

The **German** Federal Constitutional Court has declared the "hygiene pillory" – a law that provides for public consumer warnings about exceeded limit values in food and other infringements – to be partly unconstitutional. EIKE MICHAEL FRENZEL examines the decision (German).

Elsewhere

DAVID KUCH reports on a case pending before the **Berlin** Constitutional Court on the question of whether the state Senator of Justice, when speaking critically of the AfD in

parliament, infringes on its right to equal treatment (spoiler: most likely not).

OLIVIER BEAUD analyses the decision of the **French** Constitutional Council on access to universities (French).

GIANFRANCO BALDINI, ANDREA PEDRAZZANI and LUCA PINTO suspect that the search for a functional system to elect a government for **Italy** will not be over anytime soon.

AURELA ANASTASI describes the difficulties in **Albania** in strengthening the independence of the judiciary.

JOHN FABIAN WITT recalls on the occasion of the **US** Senate hearing on Gina Haspel, who is to be rewarded for her leading role in the illegal torture of prisoners with the office of CIA Director by Donald Trump, the considerable number of persons in American history who after committing all sorts of atrocities raised to the highest offices without much impediment.

TOM GERALD DALY reports how in **Africa**, with the African Court of Human Rights as a nucleus, a network of constitutional courts emerges.

So much for this round. Next week, there will be a two-days hearing at the Federal Constitutional Court in Karlsruhe about the funding of the public broadcasting system in **Germany** for which every household in Germany is legally obligated to pay a substantial fee, whether anyone watches public TV and listens to public radio or not. I, for one, will take a break next weekend, the official reason being the high Christian holiday of Pentecost, the unofficial that I need it, so I'll report back in two weeks, okay? In the meantime, all the best and take care,

Max Steinbeis

LICENSED UNDER CC BY NC ND

SUGGESTED CITATION Steinbeis, Maximilian: *Show your Fetish*, *VerfBlog*, 2018/5/12, <https://verfassungsblog.de/show-your-fetish/>.